No. 86-564

In The
Supreme Court of the United States
October Term, 1986

DAVID T. FLAHERTY, Secretary, North Carolina Department of Human Resources, in his official capacity, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of North Carolina

APPELLANTS' REPLY BRIEF TO APPELLEES' BRIEF ON THE MERITS

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ARGUMENT I

42 U.S.C. (SUPP. III) § 602(a)(38) DOES NOT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Although the State appellants firmly believe that the district court in *Gilliard v. Kirk*[1], 633 F.Supp. 1529 (W.D.N.C. 1986) was in error in many aspects of its opinion, the State is in accord with the court's conclusion that the State of North Carolina had indeed properly interpreted 42 U.S.C. (Supp.III) § 602(a)(38) by requiring child support income of co-resident siblings or half-siblings to be included as a family resource. *Id.* at 1543. For reasons more fully stated in the Reply Brief of the federal appellants, that portion of the *Gilliard* opinion should be upheld.

However, the district court then held that the amended statute worked an unconstitutional taking of private property, in the form of child support, based upon its erroneous interpretation of North Carolina child support laws. *Gilliard v. Kirk*, 633 F.Supp. 1529, 1548-1549 (W.D.N.C. 1986). This intrinsic error in the district court's overly simplified reading of this area of North Carolina law is perpetuated throughout the Brief for the Appellees (as well as in the various amicus briefs) filed with this Court.

In North Carolina, "child support" is not termed a property right but is an obligation of a parent to support his or her minor child. This personal duty to support is enforceable on behalf of the child and cannot be abrogated or contracted away as long as the status of parent and minor child endures. This State's courts and legislature recognize that not only should this obligation be enforced for the child's benefit, but also that the person having custody of and responsibility for the child should be permitted flexibility in determining what is in the child's best inter-

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[1] Effective April 8, 1987, David T. Flaherty, became the Secretary of the North Carolina Department of Human Resources. Appropriate caption changes have been made in this Court.

ests and for his benefit. Therefore, both North Carolina statutes and case law specifically permit the custodial parent to assign the right to enforce a child support obligation in order to accept public assistance. Where, as a condition of eligibility, a public assistance program requires an assignment of the right to support, the custodian may weigh this requirement against the custodian's determination of what is in the child's best interest in deciding whether to voluntarily participate in the program. If the custodian elects to participate in the program by fulfilling the eligibility requirements, there has been no "taking" of property by the State or Federal governments. Rather, the custodian has made a voluntary assignment which is authorized and validated under North Carolina law.

The following detailed analysis of North Carolina law regarding child support in general, as well as the State's AFDC program, reveals the inherent fallacy of the district court's ruling.

It is the public policy of the State of North Carolina that parents must support their children. *Pace v. Pace,* 244 N.C. 698, 94 S.E. 2d 819 (1956). The State's child support statute is basically codified at N.C.G.S. § 50-13.4. This statute sets out a procedure to enforce child support obligations in which the father and mother are primarily liable for the support of the minor child, payments are to be ordered to meet the reasonable needs of the child, and payments are to be paid to the custodian of the child for its benefit. It should be noted that although appellees argue throughout their brief (examples at pp. 19, 65, 68, 71) that the only focus should be placed on the child support funds themselves as constituting "private property" of the child, this proposition is not supported by the case law of this State. In North Carolina the primary emphasis is placed upon the child's right to enforce the support obligation of the parent. " 'The relationship of parent and child is a status, and not a property right.' . . . The common law obligation of a father to support his child is not 'a debt' in the legal sense, but an obligation imposed by law. . . . It is

not a property right of the child but is a personal duty of the father which is terminated by his death." *Layton v. Layton,* 263 N.C. 453, 456, 139 S.E. 2d 732, 734 (1965).[2] The Supreme Court of North Carolina has recently re-emphasized the nature of this State's child support laws as being in the form of the obligation of the parent to support his child. In *Alamance County Hospital v. Neighbors,* 315 N.C. 365, 367, 338 S.E.2d 87, 89 (1986), the Court stated: "The father's duty of support is not a debt but an obligation imposed by law which arises from his status as father. A father cannot contract away or transfer to another his responsibility to support his children."

N.C.G.S. § 50-13.5(c)(1) provides that "The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property." This subsection (c)(1) has been determined by our State court to mean that an action for child support is in the nature of an action to enforce a civil obligation and is *in personam* in nature. *Johnson v. Johnson,* 14 N.C. App. 378, 188 S.E.2d 711 (1972). Thus, North Carolina views child support actions as being the enforcement of the *obligation* of the parent to support his or her minor child.

North Carolina courts do recognize that in certain instances a child may have an exclusive private property right. For example, in *Parker v. Moore,* 263 N.C. 89, 138 S.E.2d 821 (1964), the North Carolina court held that the parents of a minor had no right to divert the proceeds of a life insurance policy payable to the minor. Indeed, before any part of a minor's separate estate may be used for his support, it must be shown that the responsible parent lacked the ability to provide the necessary support. *Lee v. Coffield,* 245 N.C. 570, 96 S.E.2d 726 (1957). The obligation of the parent to support his minor child is paramount,

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[2] Parents may obligate themselves to support a child beyond death or past majority by consent judgment or contract. *Id.*

"whether the child has property or not." *Pickelsimer v. Critcher,* 210 N.C. 779, 780, 188 S.E. 313 (1936). Again, in the area of child support, the child's right to enforce the obligation of parental support is viewed as a right distinct from the child's exclusive property right in certain forms of tangible goods or money.

Appellees' arguments throughout their brief, which center on the illegality of the diversion of specific child support money from one child to another, ignore the realities of life as well as the underlying rationale of North Carolina law. By focusing on the obligation of a parent to support his minor child rather than the explicit accounting of funds, practical realities of family life can be accommodated. For instance, in North Carolina, possession of the home may be awarded as part of child support. N.C.G.S. § 50-13.4(e); *Martin v. Martin,* 35 N.C. App 610, 242 S.E. 2d 393, *cert. denied,* 295 N.C. 261, 245 S.E.2d 778 (1978). In such an instance would any rational judge order that half-brothers or sisters be banished from the home because the minor child's support was being diverted to them? Such an absurd result is avoided because the non-custodial parent's obligation to support his or her child is legally fulfilled by the support order, irrespective of whether other children may derive incidental benefit. Although in practical terms the other children are benefiting from the support order, *in law* the parent is only fulfilling his legal obligation to support his or her minor child. Once the support obligation is enforced, it is within the discretion of the custodial parent to determine in the interests of the child exactly what would best benefit the child. See, N.C.G.S. § 50-13.4 and discussion infra.

42 U.S.C. § 602(a)(26)(A), enacted in 1975, requires AFDC applicants as a condition of eligibility to assign to the State any accrued right to child support. The States must administer their AFDC programs pursuant to plans which conform to applicable federal statutes and regulations. *Heckler v. Turner,* 470 U.S. 184 (1985). In conformity with federal law, North Carolina enacted in 1975 a

statute which mandates the assignment of child support upon acceptance of public assistance by a dependent child. This statute is codified at N.C.G.S. § 110-137.

> "§ 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.
>
> By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 13.)" *See also,* N.C.G.S. § 110-135 (J.S. at A-167 to A-168).

The validity and binding effect of the assignment provisions of this North Carolina statute have been recognized many times by our courts.

In *Cox v. Cox,* 44 N.C. App. 339, 341, 260 S.E.2d 812, 813 (1979), the Court stated the following:

> "Under the law of North Carolina, when the people, through the state, provide support for minor children by AFDC, there arises a debt owed to the state by any parent obligated to support such minor children. N.C. Gen. Stat. 110-135. The county attorney shall represent the state in proceedings to collect such debts. N.C. Gen. Stat. 110-135. The recipient of such public assistance for minor children shall be deemed to have made an assignment to the state of the right to any child support, up to the amount of public assistance received. The state is subrogated to the right of the person having custody of such children to recover any payments ordered by the courts of this state. N.C. Gen. Stat. 110-137."

In *Cartrette v. Cartrette,* 73 N.C. App. 169, 170-171, 325 S.E.2d 671, 673 (1985), the Court upheld the controlling provisions of the State's assignment statute. In construing a consent judgment lacking child support provisions, the Court held that modification was necessary due to the later receipt of public assistance by the minor child. The court stated:

> ". . . The law provides for the modification of child support orders, upon a showing of changed circumstances, to provide for the financial support of dependent children. A parent cannot contract away his or her obligation to support dependent children, *nor can a parent by contract diminish the rights of the State or a county under G.S. 110-135., et.seq.*" (Emphasis added).

Recently, in *State ex rel. Crews v. Pender Co. Child Support Enforcement Agency v. Parker,* — N.C. —, — S.E.2d —(No. 549PA86; April 7, 1987), the North Carolina Supreme Court analyzed this area of North Carolina law, emphasizing the requirement that the state laws must stay in conformity with federal law and regulations. In this action, the appellate court allowed Mrs. Crews to intervene in an action for child support brought against the minor child's father by the State of North Carolina. Mrs. Crews' intervention was allowed upon her allegation that the State had failed to assist her in obtaining compensation from the child's father for amounts she had spent to support the child before she began receiving public assistance. In its examination of North Carolina's assignment statute and its interrelation with federal law, the Court stated:

> "Title IV of the Social Security Act establishes AFDC and sets forth requirements that the states must meet under the Federal Child Support Enforcement Program. 42 U.S.C. §§ 601-615, 651-665 (1983 & Cum. Supp. 1986). In order to receive federal AFDC funding, a state must submit its public assistance plan for approval. 42 U.S.C. § 601 (1983). This plan must provide, inter alia, that recipients of assistance

> assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

42 U.S.C. § 602(a)(26)(A) (Cum. Supp. 1986); *see also* 45 C.F.R. § 232.11(a) (1986).

The *Crews* court held that under N.C.G.S. § 110-137, in compliance with federal law, the assignment of child support is made only up to the amount of public assistance received. This is of course the literal reading of N.C.G.S. § 110-137 and comports with the policies and procedures of the North Carolina AFDC program.[3] The North Carolina Supreme Court in *Crews* sanctioned the authority and discretion of the child's custodian to participate in the State's AFDC program and comply with its assignment requirements as a condition of eligibility.

The appellees apparently would have this Court believe that the whole of North Carolina law regarding the support of minor children rests solely in Chapter 50 of the North Carolina General Statutes, centering primarily in N.C.G.S. § 50-13.4. In the language of subsection (d) of § 50-13.4 lies appellees' primary argument: the contention that a statutory requirement that a parent assign child support rights to the State is contrary to state law, because it could not be for the sole "benefit of such child." (Appellees' Brief, pages 17, 92). However, appellees overlook the essential fact that the basic foundation of North

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[3] If a family receives income in the form of child support which was in excess of the payment standard for their family unit, the family would not be initially eligible for AFDC and the assignment provisions would never come into effect. In the case of a family already participating in the AFDC program who later received child support in excess of the payment standard, the family unit would become ineligible for AFDC assistance because the family's income level would then be in excess of the payment standard. (J.A. at pp. 41-53, 76-91).

Carolina child support laws, i.e., the "obligation" of a parent to support his or her minor child, is not affected by the enactment of 42 U.S.C. (Supp.III) 602(a)(38). Appellees' contention that "(t)he inescapable effect of the disputed HHS regulations is to strip state judges of the power to direct an award of child support to a child who happens to reside with siblings on AFDC" is simply untrue. (Appellees' brief, page 59). State courts are still legally obligated to set child support payments owed by a supporting parent in accordance with the reasonable needs of the child. This continuing judicial requirement was amply illustrated in *Wilkes County v. Gentry,* 311 N.C. 580, 319 S.E.2d 224 (1984). In this case the County Department of Social Services instituted an action to recover past public assistance paid on behalf of defendant's minor child and to secure an order for future child support. The North Carolina Supreme Court held that the defendant as a responsible parent was liable for the amount of past public assistance paid. It then remanded the case for a *determination of the reasonable needs of the minor child and the ability of the father to pay them* in accordance with N.C.G.S. § 50-13.4(b) and (c). The assignment provisions of North Carolina public assistance law in no way affected the *obligation of the parent to support his or her minor child.* The amount of child support would still be determined in accordance with N.C.G.S. § 50-13.4. The amount ordered would then be assigned to the State in compliance with eligibility requirements of the AFDC program and pursuant to N.C.G.S. § 110-137.

Appellees' analysis, which focuses solely on Chapter 50, ignores completely the State's *Child Welfare* laws as contained in Chapter 110 of the North Carolina General Statutes. Article 9, *Child Support,* sets out a comprehensive scheme for the enforcement of child support laws in the State of North Carolina. Sections of Chapter 110 which are important to the State's argument, in addition to § 110-137, are as follows:

§ 110-128. *Purposes.*

The purposes of this Article are to provide for the financial support of dependent children; to enforce spousal support when a child support order is being enforced; to provide that public assistance paid to dependent children is a supplement to the support required to be provided by the responsible parent; to provide that the payment of public assistance creates a debt to the State; to provide that the acceptance of public assistance operates as an assignment of the right to child support; to provide for the location of absent parents; to provide for a determination that a responsible parent is able to support his children; and to provide for enforcement of the responsible parent's obligation to furnish support and to provide for the establishment and administration of a program of child support enforcement in North Carolina.

§ 110-140. *Conformity with federal requirements.* — Nothing in this article is intended to conflict with any provision of federal law or to result in the loss of federal funds.

§ 110-141. *Effectuation of intent of Article.*

The North Carolina Department of Human Resources shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

Chapter 108A of the General Statutes, entitled *Social Services,* provides for the establishment and supervision of the AFDC program in North Carolina in Article 2, Part 2. N.C.G.S. 108A-25, 108A-27, 108A-31 provide as follows:

§ 108A-25. *Creation of programs.*

(a) The following programs of public assistance are hereby established, and shall be administered by the county department of social services or the Department of Human Resources under federal regulations or under rules and regulations adopted by the

Social Services Commission and under the supervision of the Department of Human Resources:

(1) Aid to families with dependent children;

* * *

(c) The Department of Human Resources is hereby authorized to accept all grants-in-aid for programs of public assistance which may be available to the State by the federal government. The provisions of this Article shall be liberally construed in order that the State and its citizens may benefit fully from such grants-in-aid.

§ 108A-27. *Authorization of Aid to Families with Dependent Children Program.*

The Department is authorized to establish and supervise an Aid to Families with Dependent Children Program. This program is to be administered by county departments of social services under federal regulations and rules and regulations of the Social Services Commission.

§ 108A-31. *Application for assistance.*

Any person or his representative who believes that he or another person is eligible to receive aid to families with dependent children may apply for assistance to the county department of social services in the county in which the applicant resides. It shall be made in such form and shall contain such information as the Social Services Commission and federal regulations may require.

Thus, it is clear from a reading of the *entire* body of law pertinent to this argument that the child support laws of North Carolina are in no way violated by the federal law. Indeed, the law of the State in this area is that North Carolina must be in accord with federal law. *Cf., Lackey v. Department of Human Resources,* 306 N.C. 231, 293 S.E.2d 171 (1982) (Medicaid regulations). Hence appears the consistent reiteration in the above-quoted statutes that child support programs and the AFDC program are to be administered in *conformity* with federal law.

North Carolina has legislated by statute and approved by case law the principle that a custodian of a minor child may act in its best interests by assigning the child's right to support in order to receive public assistance. At common law, the duty of a parent to support his child was well recognized. *Sanders v. Sanders,* 167 N.C. 319, 83 S.E. 490 (1914). At common law, as well as under prior North Carolina statute, this duty was placed primarily on the father. N.C.G.S. § 50-13.4(b); *Tidwell v. Booker,* 290 N.C. 98, 225 S.E.2d 816 (1976). However, legislative enactments can of course alter the common law as well as former statutory law. Thus, in 1981, North Carolina amended the child support statute, N.C.G.S. § 50-13.4(b), to change prior decisions and statute by making both the father and mother primarily liable for the support of their children in the absence of pleading and proof that the circumstances otherwise warrant. *Plott v. Plott,* 313 N.C. 63, 326 S.E.2d 863 (1985). The 1962 and 1967 decisions, relied upon by the district judge in *Gilliard* to support his holding that the mother may not legally assign the right to enforce child support to the State because it is the exclusive property of the child, were *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E.2d 113 (1962) and *Tyndall v. Tyndall,* 270 N.C. 106, 153 S.E.2d 819 (1967). However, in 1975 the North Carolina legislature enacted N.C.G.S. § 110-137. The enactment of this statute makes it very clear that under North Carolina law a custodial parent may indeed assign the right to enforce a child support obligation in order to receive public assistance. This was precisely the situation presented in *Wilkes County v. Gentry,* 311 N.C. 580, 319 S.E.2d 224 (1984) and other cases construing N.C.G.S. 110-137 cited throughout this reply brief. To the extent that *Goodyear* and *Tyndall* may be read to reach the conclusion of the district court (a conclusion Defendants contend is far too restrictive and in error), the validity of the lower court's decision cannot be upheld in view of the later statutory enactments and court opinions. No North Carolina appellate cases have been decided upon facts other than the assignment of

child support in a family which did not include half-siblings. Although 42 U.S.C. (Supp.III) § 602(a)(38) has not been placed in issue before our appellate courts, all of the opinions which review the assignment provisions consistently emphasize that under state statutes and federal law, the public assistance programs of North Carolina must be administered in conformity with federal law.[4] Thus, the district court's analysis in *Gilliard* has not been the law of the State of North Carolina for at least a dozen years.

Notwithstanding the statutory law of North Carolina, appellees seem to argue that the inclusion of a child receiving child support into the AFDC standard filing unit, as required by 42 U.S.C. (Supp. III) § 602(a)(38), is not in the child's best interests as a matter of law. This argument of course completely eviscerates any discretion of the custodial parent in determining exactly what would best benefit his or her minor child. This Court has recognized that the exercise of parental discretion in decisions is often not easy: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions . . . . (and there exists) the traditional presumption that the parents act in the best interests of their child . . . ." *Parham v. J.R.*, 442 U.S. 584, 602-604 (1979) (voluntary commitment of a minor). Participation in the AFDC program is a voluntary choice on the part of a parent of an eligible child(ren). *Wyman v. James*, 400 U.S. 309 (1971). North Carolina courts have recognized that money, although an important factor in life, is not the sole determinative of what is best for a child. "There are some things that are worth

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[4] Indeed *State ex rel. Crews v. Pender Co. Child Support Enforcement Agency v. Parker*, — N.C. —, — S.E.2d — (No. 549PA86; April 7, 1987), points out the application of 42 U.S.C. § 657(b)(1) to the State assignment statutes. This statute was passed as a companion statute to 42 U.S.C. § 602(a)(38) as part of the 1984 DEFRA legislation. (Brief for the Federal Appellant, p. 14).

more than money. One of these is the peace of the fireside and the contentment of the home . . . ." *Small v. Morrison,* 185 N.C. 577, 585, 118 S.E. 12, 16 (1923). In custody matters, North Carolina courts have consistently recognized that the best interests of the child may not necessarily coincide with living with the person who possesses the most money. See, *Brake v. Mills,* 270 N.C. 441, 154 S.E.2d 526 (1967); *Rhodes v. Henderson,* 14 N.C. App. 404, 188 S.E.2d 565 (1972). In this State, absent abuse or neglect, it is the custodial parent who possesses the discretion to determine what is in the best interests of the minor child. See, *Zande v. Zande,* 3 N.C. App. 149, 164 S.E.2d 523 (1968). In *Goodyear v. Goodyear,* 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962), the court quoted with approval the following language: " '[The mother] was merely the custodian of the funds with the right and duty to use them as provided in the decree. *Having the children under her custody, care, and control, she is the one best situated and best fitted to know what is needed and best for them. In this she may use a sound discretion.*' " (Emphasis added). Appellees' argument (Appellees' brief, page 86), that the child has not consented to the assignment of his right to enforce his parents' support obligation, ignores the legal fact that a minor cannot give such consent. N.C.G.S. § 110-44.1. Certainly, a custodial parent could determine in his or her sound judgment that it would be in the best interests of the child to participate in the AFDC program, thereby assigning the right to enforce a child support obligation, because (1) a steady source of AFDC income would be received instead of erratic or unpaid child support,[5] (2) the child would be

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[5] In the period from October 1, 1984 through June 30, 1985, in both AFDC and Non-AFDC cases, an average of approximately 30% of individuals obligated to make child support payments paid an amount sufficient to equal or exceed their monthly support obligations, approximately 18% paid an amount less than their monthly obligations, and approximately 52% paid no support within any given month. (Affidavit of Dan Miles, J.A. at p. 92).

automatically entitled to receive free medical care under the Medicaid program as a result of inclusion in the AFDC filing unit (*see* 42 U.S.C. (& Supp. II) 1396(a)(10)(A)(i)(1)), and (3) the standard of living of the family in which the child lives would be enhanced. Although the decision to participate or not participate in the AFDC program may be a difficult one, it is a voluntary decision which rests within the discretion of the custodial parent. An assignment of the right to enforce a child support obligation in order to receive public assistance can indeed be in the best interests and "benefit" the minor child, in accordance with the statutes and case law of the State of North Carolina.

The assignment provisions of the federal law, as incorporated into North Carolina law by statute, have repeatedly been sustained and enforced by the appellate courts of this State. *State ex rel. Crews v. Pender Co. Child Support Enforcement Agency v. Parker,* — N.C. —, — S.E.2d — (No. 549PA-86; April 7, 1987); *Wilkes County v. Gentry,* 311 N.C. 580, 319 S.E.2d 224 (1984); *Cartrette v. Cartrette,* 73 N.C. App. 169, 325 S.E.2d 671 (1985); *Cox v. Cox,* 44 N.C. App. 339, 260 S.E.2d 812 (1979); *see also, Jolly v. Wright,* 300 N.C. 83, 265 S.E.2d 135 (1980). Appellees' arguments, if upheld by this Court, would not only affect 42 U.S.C. (Supp. III) § 602(a)(38), but would essentially alter or nullify the comprehensive child support system established by federal and state law.

ARGUMENT II

THE DISTRICT COURT ERRED IN ORDERING THE STATE DEFENDANTS TO MAKE RETROACTIVE PAYMENTS TO THE INDIVIDUAL CLASS MEMBERS.

In its Final Order, filed July 3, 1986, the district court ordered "Prospective Relief" in the form of an injunction prohibiting the implementation of 42 U.S.C.

(Supp.III) § 602(a)(38). (J.S. at A-123). The court then ordered "Retroactive Relief" in the form of payment to individual class members of past benefits they had been denied because of the implementation of 42 U.S.C. (Supp. III) § 602(a)(38). (J.S. at A-124). Retroactive notice relief was also ordered by the court. (J.S. at A-124 to 127). Throughout this portion of the order the district court consistently refers to "retroactive payment" (J.S. at A-124) and "retroactive benefit(s)". (J.S. at A-125 to 127). The opinion of the Court, dated May 7, 1986, of course makes it very clear that the district judge was ordering the state defendants to pay "retroactive benefits" to the individual class members. *Gilliard v. Kirk,* 633 F.Supp. 1529, 1563-1564 (W.D.N.C. 1986). As more fully explained in the State's Brief on the Merits (pp. 32-42), this type of award by a federal court is absolutely barred by the Eleventh Amendment to the Constitution of the United States. There has been no unequivocal expression of congressional intent to waive the State's Eleventh Amendment immunity in this case. *See, Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985). There is no statute nor constitutional provision enacted by the State of North Carolina which would waive its Eleventh Amendment immunity to suit in federal court.[6] *Id.*

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[6] In their Brief, appellees express their view that the State appellants agreed to "return all funds improperly seized or withheld" in a Memorandum of Law in Support of Stay Pending Appeal (Appellees' brief, p. 122, n.20) and that state officials "expressly acknowledged . . . that they could be required to return the disputed child support funds" if later determined to be improperly withheld, citing a Memorandum submitted to the district court by the State concerning the Eleventh Amendment. (Appellees' brief, pp. 139-140). Of course, these alleged statements in a Memorandum fall far short of the unequivocal waiver by a State of its Eleventh Amendment immunity in a specific statute or constitutional provision as required under *Atascadero.* Furthermore, the State has never conceded that retroactive benefits could be awarded by the district

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The district court ordered retroactive payments in *Gilliard* because "the state defendants did not seek relief from the provisions of the original injunction by formal motion until after plaintiffs filed for further relief . . . ." *Gilliard v. Kirk,* 633 F.Supp. 1529, 1564 (W.D.N.C. 1986). The court cited authority from this Court for its order of retroactive payments as follows: *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976); *Walker v. City of Birmingham,* 388 U.S. 307 (1967); and *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). These cases are inapposite because they deal solely with the contempt powers of a federal court when presented with a violation of its orders. They simply do not address the question of an award of retroactive damages against a sovereign state. Federal courts may not award retroactive compensatory damages against a sovereign state under the guise of its contempt powers. See, *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932 (1986); *Edelman v. Jordan,* 415 U.S. 651 (1974). Retroactive relief cannot be ordered by a federal court against a state "if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932, 2940 (1986). The district court in *Gilliard* did not hold the

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court. On September 9, 1985, the State filed a motion "to dismiss the plaintiffs' claims for retroactive payments" . . . "on the grounds that these claims are barred by the Eleventh Amendment to the United States Constitution." (J.A. at p. 98). The Memorandum filed that same day was explicit that an order of retroactive damages was barred by the Eleventh Amendment. Similiarly, in its Memorandum in Support of a Stay, the State referred solely to the restoration of the "rights to receive AFDC" in the sentence quoted by the appellees in their brief. Indeed, an entire section in this Memorandum is devoted to the district court's error in its award of retroactive payments. These erroneous statements by the Appellees' concerning the State's position on the award of retroactive benefits is totally unfounded and should be disregarded by this Court.

State Defendants in contempt, but instead awarded retroactive damages for the alleged violation of its injunction. This order was barred by the Eleventh Amendment to the United States Constitution.

Furthermore, the district court could not legally hold the State of North Carolina in contempt because the 1971 injunction was never violated. Appellees suggest to this Court that the 1971 injunction should be read in a vacuum, disregarding the opinion in *Gilliard v. Craig,* 331 F.Supp. 587 (W.D.N.C. 1971). (Appellees' Brief at pp. 127). This novel theory would directly contradict well-established principles holding that "(s)ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard,* 414 U.S. 473, 476 (1974). In order to ascertain exactly what conduct was prohibited, it was absolutely necessary that state officials read the injunction and opinion together in an effort to understand the meaning of the injunction itself. See, *Gunn v. University Committee,* 399 U.S. 383 (1970). As discussed more fully in the State's Brief on the Merits (pp. 17-24), the opinion in *Gilliard v. Craig* prohibited, by injunction, conduct which was illegal under the Social Security Act as written in 1971. This statutory basis for the injunction was later confirmed by the judge who issued the injunction in his Order denying the State's motion for a three-judge court (J.S. at A-115 through A-120) and in his opinion in *Gilliard v. Kirk,* 633 F.Supp. 1529, 1543 (W.D.N.C. 1986). Indeed, the court's reasoning in *Gilliard v. Kirk* is internally inconsistent in that (1) it acknowledges that the 1971 injunction was issued when the court invalidated the State's AFDC policy because it "violated the intent of the Social Security Act as then written", a statutory basis, and (2) then holds that the 1971 injunction was violated when the State altered its policy to conform with the intent of the

Social Security Act as amended in 1984. *Gilliard v. Kirk,* 633 F.Supp. 1529, 1543, 1546-1548 (W.D.N.C. 1986).

Although appellees state to this Court that "state officials believed they were in violation of the 1971 injunction" (Appellees' brief p. 126), such is not the case. For this argument, appellees rely on a State memo, concerning the effect of 42 U.S.C. (Supp.III) § 602(a)(38), which indicates initial uncertainty as to the action the State was obligated to pursue in view of the amended statute. (J.S. at A-79). The district court in *Gilliard* interpreted this memo to evidence that state officials were aware of "perceived conflicting obligations" and chose to implement the statute rather than return to the court for a ruling. *Gilliard v. Kirk,* 633 F. Supp. 1529, 1564 (W.D.N.C. 1986). This Court in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984), succinctly invalidates this reasoning of the *Gilliard* court relied upon to uphold its award of retroactive damages. Justice Powell writing for the Court stated: ". . . The Court in *Larson* explicitly rejected the view . . . 'that an officer given the power to make decisions is only given the power to make correct decisions'. . . (A)n officer might make errors and still be acting within the scope of his authority. . . . (A)t least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it. . . . Any resulting disadvantage to the plaintiff was 'outweigh(ed)' by 'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention." *Id.* at 112, n.22, and 113-114. The emphasis is upon the effective operation of government which is facilitated by the ability of its officials to exercise their best judgment when carrying out their duties in the scope of their authority. The district court in *Gilliard* had no authority to award retroactive damages against the State of North Carolina simply because its officials were aware of an injunction but chose to implement its

AFDC policy in accordance with the mandates of present federal law based upon their judgment that the amended statute superseded an injunction which enforced prior law.

Appellees also argue to this Court that in order to be in compliance with the 1971 injunction, State officials were obligated to make the determination that child support income was "legally available to all members of the family group" under state law. (Appellees' brief, pp. 124, 131-132). As discussed more fully in the State's Brief on the Merits (pp. 19-24), the enactment of 42 U.S.C. (Supp.III) § 602(a)(38) did in fact make the determination that this income was legally available. North Carolina statutes governing the AFDC program mandate that the State program is to be conducted in accordance with federal statutes and regulations. N.C.G.S. §§ 108A-25, 108A-27, 108A-31. North Carolina case law, *See, State ex rel. Crews v. Pender Co. Child Support Enforcement Agency v. Parker*, — N.C. —, — S.E.2d — (no. 549PA86; April 7, 1987); c.f., *Lackey v. Department of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982) (Medicaid regulations), as well as federal opinions, *see, Heckler v. Turner*, 470 U.S. 184 (1985), consistently hold that the State's AFDC program must be in conformity with federal law. Therefore, income which is "legally available" under federal law is perforce "legally available" under state law. As was demonstrated in Argument I of this Reply Brief, there is no conflict between federal and state law in the implementation of the § 602(a)(38) standard filing unit, with its attendant assignment requirements.

Finally, appellees argue to this Court that without the ability to order retroactive benefits against a state treasury, a federal court would be powerless to enforce its injunction against a State defendant. (Appellees' Brief pp. 142-148). This contention has no basis in law or fact. A full range of contempt sanctions is still available to federal courts. These sanctions may take the form of ancillary remedies to ongoing violations of federal law as in *Milliken*

v. Bradley, 433 U.S. 267 (1977); the imposition of attorneys fees as in *Hutto v. Finney,* 437 U.S. 678 (1978); a conditional jail term as in *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); or a civil fine as in *Local 28 of Sheet Metal Workers v. E.E.O.C.,* — U.S. —, 106 S.Ct. 3019, 3033 (1986). However, the federal Court may *not* order a contempt sanction which is essentially the award of retroactive damages in another form. *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932 (1986). Moreover, in structuring its contempt sanction, a federal court must take care that the sanction is not so large or unexpected that it interferes with the State's budgeting process, *see, Hutto v. Finney,* 437 U.S. 678, 692 n.18 (1978), but these considerations certainly do not demean the power of the court.[7] The district court's award of retroactive benefits in *Gilliard* was totally without any basis in law and should be reversed by this Court.

CONCLUSION

The district court's ruling on the constitutionality of 42 U.S.C. (Supp.III) § 602(a)(38) and its award of retroactive benefits against State appellants should be reversed.

Respectfully submitted,

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7 In answering appellees' argument on this point, State appellants are not implying to this Court that the district judge did hold the State in contempt or that contempt sanctions were in any way authorized.